

United States of American  
Before the Federal Communication Commission

GN Docket No. 12-91

**In re: COMMISSION SEEKS COMMENTS ON EMERGENCY  
COMMUNICATIONS BY AMATEUR RADIO AND  
IMPEDIMENT TO AMATEUR RADIO COMMUNICATIONS**

Richard A. Golden (hereinafter "commentator") of 10627 Jones Street,  
#101B, Fairfax, Virginia 22030 provides the following in response to the  
Commission's above referenced request.

**A. Scope of response:**

This response is limited and it addresses, in particular, the question  
at paragraph "2(a)" "What private land use restrictions on residential  
antenna installations have amateur radio operators encountered?"

**B. Summary of Response:**

In urban counties, such as Fairfax County, Virginia, in the vast majority of land available for residential purposes, restrictive covenants prohibit the use of land for the erection of outdoor antennas. Simply put, amateur radio licensees are unable to obtain a residence that is free from such restrictions.

The creation and implementation of such restrictive covenants is the results of the synergistic relationship and activities between the developers of residential land, local governmental bodies (typically, those that exercise both zoning or other land use regulation authority and that simultaneously exercise franchising authority), and cable television system operators.

The implementation of these restrictive covenants was to limit or otherwise avoid competition with cable television systems.

The material of these comments, albeit antidotal to the conditions in Fairfax County, Virginia, may nonetheless be typical of conditions in most metropolitan area in the United States.

### **C. Discussion:**

Fairfax County Virginia is an area suburban to Washington, D.C. It encompasses approximately 400 square miles of area, and until the mid 1900s it was generally rural with high concentration of dairy farming activities. The expansion of the greater metropolitan Washington, D.C., area as a residential center encompassed Fairfax County as a suburban area with significant development starting in the 1960s. This development accelerated through the 1970s and until at least the end of the 20<sup>th</sup> century. Under local law, subdivision of land into individual lots or parcels of less than 5 acres was subject to local ordinance provisions, and in most instances both subdivision plats, subdivision deeds and associated restrictive covenants were submitted to and conditioned upon local government approvals. Few residential subdivisions were approved that did not contain restrictive covenants that prohibited the land owners from using the lands for the purposes of external radio and television antennas.

Concurrently with a widespread conversion of the existing agricultural lands in to residential subdivisions was the advent of cable television a more pervasive broadcast and communications medium. In March of 1978 Fairfax County began a process of seeking to have a cable television franchise awarded to provide such multimedia services to residents of the County. Studies engaged by the County (that is, the local franchising authority) indicated, at the time, that significant economic

obstacles existed for the construction of a viable cable television system for the County. Information at the time raised significant doubts that a cable television operator could viably build and operate a system. High levels of "penetration" (a high percentage of the existing populace) would be required for an economically viable system.<sup>1</sup>

Some potential suppliers of cable television systems indicated that if they were to provide cable television services, that the franchise agreement would need to make a provision excusing the construction of a system into areas that did not have at least 15 units per mile, and that if the number of household units were between 15 and 35 units per mile, that the cable operator would be able to increase fees for services in such sparsely populated areas. Simultaneously, the elected members of the County's governing body sought to avoid any situation where any groups of residents would be precluded from having access to cable television services.

Land developers' actions implementing wholesale prohibitions on the use of external antennas provided an incentive to assure that the erection of cable television systems would occur in lands being developed for residential purposes. In other words, the widespread utilization of

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<sup>1</sup> Studies provided to Fairfax County, Virginia during the 1978 through 1982 time period indicated that a penetration rate of less than 35% would not allow the construction of an economically viable cable television system.

restrictive covenants prohibiting external antennas was a simple expedient to assure that the clearly existing demand for cable television services would be addressed. Without competing outside antennas, cable television operators were more readily assured that significant high levels of penetration would be realized in new subdivision areas.

At the same time, the synergistic relationship of the relevant parties furthered the County's proprietary interests. That is, attendant franchise fees that could be an additional source of public revenues. Widely perceived by the County was that a 5% of gross subscriber revenues would be paid for franchise fees that that such fees would be properly characterized as "rent" for the right of the cable television franchisee to occupy public lands (mostly street rights of way). Such revenues would and could be paid directly into the County's general fund. Over the years, the aggregate amounts of franchise fee payments have been in the range of hundreds of millions of dollars.

While little of the governmental activities in fostering and promoting regulation and restrictions were explicitly aimed at amateur radio service licensees, a general posture against external antennas was nonetheless pervasive.

Much of this is now not new to the Federal Communication Commission. The blanket proscriptions on the use of outdoor antennas also precluded the erection of satellite television receiving antennas. The Commission is fully aware of the legislation and the Federal Communications Commission's ruling makings addressing Over-the-Air Reception Devices (OTARD), 47 C.F.R. Section 1.4000. These restrictive covenants are still anti-competitive in nature and effect, and they have a direct impact on interstate commerce.

#### **D. Conclusion.**

While postured to ostensibly be private agreements among landowners, the widespread use of restrictive covenants proscribing the erection and use of external antennas is, in fact, a wide-spread activity of regulation at the local (and state levels) for the purposes of proprietary gain by local units of government. The covenants' effects are anti-competitive in design and purpose, and they directly impact upon interstate and foreign communications and commerce.

This is a subject of appropriate federal preemption

Dated: May 17, 2012.

Respectfully submitted

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